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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

CITY OF CHICAGO,

Petitioner,

v.

JESUS MORALES, *et al.*,

Respondents.

On Writ of Certiorari to the Supreme Court of Illinois

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

ARGUMENT

Respondents and their amici level most of their fire at the gang loitering ordinance's use of the term "loiter." They claim that it is fatally vague, reaching all sorts of innocent or even constitutionally protected conduct. But the claim that the ordinance is invalid because "[p]eople of ordinary intelligence cannot understand how to comply with its requirement" (Resp. Br. 18) is easily dismissed. After all, the ordinance does not prohibit "loitering," but rather only disobedience by loiterers to a police order to disperse. Anyone with even a modicum of common sense knows what is expected of him when he is ordered to move on.

Respondents' true quarrel with the ordinance is thus not with its clarity, but its objective—they believe there can be no justification for a law authorizing the police to order persons to disperse who are engaged in what respondents view as "everyday, innocent behavior." Resp. Br. 19. But by authorizing the police to take proactive action against groups of persons whose loitering creates special risks, this ordinance differs little from any other prophylactic enactment. Laws as diverse as those prohibiting the possession of syringes or the admission of minors into establishments that sell alcoholic beverages are directed at conduct that is often harmless, but which is nevertheless sufficiently likely to lead to substantive evils that a prophylactic ban is warranted. No principle of constitutional law forbids prophylactic enactments even though they will occasionally, or even frequently, reach conduct that is harmless or inoffensive.

Moreover, the gang loitering ordinance does not regulate all loitering, but instead only loitering by groups containing members of criminal street gangs. Even respondents do not doubt that this ordinance contains some enforcement standards—at a minimum, respondents do not

dispute that the ordinance applies only to persons who are standing still, nor do they doubt there are a variety of objective means available to determine gang membership. And requiring groups of persons containing gang members that remain in one place to disperse is not arbitrary, discriminatory, or irrational—if nothing else, the requirement is amply justified by the risk of drive-by shootings and other forms of gang violence that both gang members and those near them court when they loiter in public, presenting an inviting target for their rivals. The risk of violence that accompanies gang loitering also gives rise to an entirely reasonable apprehension on the part of law-abiding persons for their own safety when gangs loiter nearby. It is that fear, in turn, that ultimately leads law-abiding persons to lose faith in their communities—neighborhoods cannot prosper when people do not think it is safe to go outdoors. If the gang loitering ordinance did no more than encourage gangs to gather indoors, then, it would be fully warranted. Accordingly, the judgment below should be reversed.

I. THE GANG LOITERING ORDINANCE IS NOT IMPERMISSIBLY VAGUE.

In addressing respondents' attacks on the clarity of the gang loitering ordinance, we begin with the claim that it is impermissibly overbroad because it proscribes conduct protected by the First Amendment. We begin here because, as respondents themselves observe, whether a law "inhibit[s] the exercise of constitutionally protected rights" determines the degree of "clarity that the Constitution demands of a law." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982). See Resp. Br. 11-12, 39 n.32. After we explain why the special rules governing laws that inhibit First Amendment rights are inapplicable here, we then explain why, whatever ambiguities there may be in the definition of "loitering," this ordinance is not "impermissibly vague in all of its applications." *Hoffman Estates*, 455 U.S. at 494.

A. The Gang Loitering Ordinance Is Not Overbroad.

To support their overbreadth claim, respondents assert that the gang loitering ordinance infringes First Amendment rights of speech, assembly, and association. Yet respondents make only the barest of arguments about speech and assembly. By its terms, of course, the ordinance proscribes only loitering in disobedience of a police order, and "loiter" is defined as "to remain in any one place with no apparent purpose." Pet. App. 61a. Thus, the ordinance proscribes no "speech" of any kind; it proscribes only remaining in place after being ordered to move on.[1] As for the right of assembly, as we explain in our opening brief, it embraces only collective advocacy and expression. See Pet. Br. 19-20. As the Court put it in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995), the First Amendment protects groups that "are making some sort of collective point" (*id.* at 568), and persons "making some sort of collective point" will always, or nearly always, have an apparent purpose, and therefore will not be subject to dispersal under the gang loitering ordinance.

In fact, respondents' argument that this ordinance infringes rights of speech and assembly on its face consists of little more than a passing citation to two cases, *Shuttlesworth v. City of Birmingham*, 382 U.S. 87 (1965), and *Coates v. City of Cincinnati*, 402 U.S. 611 (1971). See Resp. Br. 53-54. But both of those cases involved laws

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[1] Even respondents do not claim that the First Amendment's protection for "freedom of speech" grants anyone the right to remain in any one place. In *Colten v. Kentucky*, 407 U.S. 104 (1972), which respondents attempt to dismiss as a case about an individual who attempted to distract a police officer from performing his duties (Resp. Br. 27-28), the Court in fact made clear that Colten had no constitutional right to disobey the officer's order to move on regardless whether he had spoken to or distracted the officer. See 407 U.S. at 109 (Colten "had no constitutional right to observe the issuance of a traffic ticket").

that forbade much more than loitering—indeed laws that reached those who assembled for constitutionally protected purposes.

As for the dicta in *Shuttlesworth* on which respondents rely, the ordinance considered in that case, "[l]iterally read," provided that "a person may stand on a public sidewalk in Birmingham only at the whim of any police officer of that city." 382 U.S. at 90. Thus that ordinance reached picketing, demonstrations, and other overt advocacy activities. Because our ordinance is limited to conduct with "no apparent purpose," it does not reach anyone who is picketing, demonstrating, or otherwise making his intentions and beliefs apparent to others. As we explain in our opening brief, the possibility that a demonstration or similar collective effort at advocacy will not have an "apparent purpose" is not sufficient to brand this ordinance substantially overbroad (Pet. Br. 22-23); and neither respondents nor the courts below have even suggested that picketers or demonstrators fall within the definition of "loitering" found in the ordinance. To the contrary, respondents concede that "anyone will surely recognize a parade or formal demonstration for what it is . . . ." Resp. Br. 64.

As for *Coates*, that case invalidated an ordinance prohibiting conduct "annoying to persons passing by" (402 U.S. at 611), and therefore proscribed any demonstration or other advocacy activity that a passing police officer might find annoying. For that reason it "violate[d] the constitutional right of free assembly and association" (*id.* at 615), but such a holding affords no support for the extravagant notion that mere casual social interaction of the type in which loiterers typically engage is an "assembly" protected by the First Amendment. If that were the case, of course, the Court's holding that social gatherings at private clubs are not protected by the First Amendment in *New York State Club Association v. City of New York*, 487 U.S. 1 (1988), would have to be overruled, and the Court's rejection of the claim that "the Constitution recognizes a generalized right of 'social association' " in *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989). would be flatly incorrect as well.

Beyond these passing references to speech and assembly, respondents rely exclusively on the ordinance's impact on associational rights to support their overbreadth claim. It is to that question that we turn next.

1. *The gang loitering ordinance does not infringe rights of association.*

Respondents make overbreadth arguments based on both types of associational rights that the First Amendment recognizes—the rights of "intimate" and "expressive" association. But standing with others in public while having no apparent purpose is neither intimate activity nor the kind of joint advocacy effort that qualifies for constitutional protection.

Respondents claim that a law directed at public loitering by groups including gang members infringes the right of "intimate" association because it will inhibit some family members' meetings in public. See Resp. Br. 57-59. But of course there is little that is "intimate" about public loitering. Those who loiter in public are on display not only to the public at large but, in particular, to the Chicago Police Department. Surely if an officer chose to stand next to loiterers in order to monitor their interactions, respondents could not claim that the officer would be infringing a right of intimate association. Cf. *United States v. Knotts*, 460 U.S. 276 (1983) (individuals have no legitimate expectation of privacy that can shield them from having their movements monitored while in public). Their claim can surely be no stronger because an officer orders them to move along instead of hovering nearby.

This Court has repeatedly rejected associational claims made by private clubs and associations that permit nonmembers to attend their functions, since gatherings in the presence of "strangers" cannot be "intimate." See *New York State Club Association*, 487 U.S. at 12; *Board of*

Directors v. Rotary Club, 481 U.S. 537, 567 (1987); *Roberts v. United States Jaycees*, 468 U.S. 609, 621-22 (1984).[2] Those who loiter in public—where anyone else may lawfully approach and observe—surely have a far weaker claim to constitutional protection under the rubric of "intimate" association. Thus, because this ordinance reaches only public behavior, it infringes no right of "intimate association."

The claimed right of expressive association has no application here either. It is recognized when people join together "for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion." *Roberts*, 468 U.S. at 618. Thus, what we have said above, and in our opening brief, answers respondents' expressive association claim. This ordinance is not directed at speech—indeed it proscribes no speech—nor is it directed at assembly or any other First Amendment right, since constitutionally protected assemblies—as well as public prayer meetings and petitioning for redress of grievances—will nearly always have an "apparent purpose."

Respondents offer two responses to this submission. First, they claim that persons often use the public ways to engage in discussion of public events and other topics protected by the First Amendment. See Resp. Br. 61-62. But this ordinance, of course, addresses loitering in disobedience of a police order, not the discussion of any topic within the ambit of First Amendment protection. As we explain in our opening brief, the fact that two persons may

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[2] Respondents attempt to minimize the significance of the presence of strangers at supposedly "private" meetings to the results in these cases (Resp. Br. 58 & n.46), but in *New York State Club Association* the Court treated that fact as dispositive, concluding that the presence of nonmembers at the clubs "defin[ed] the nonprivate nature of these associations, because of the role strangers play in their ordinary existence, as is the regular participation of strangers at meetings, which we emphasized in *Roberts* and *Rotary*." 487 U.S. at 12.

be speaking to each other as they loiter does not grant otherwise proscribable conduct constitutional immunity from regulation. See Pet. Br. 19. For example, a law prohibiting obstructing the public ways is constitutional even when applied to persons who are demonstrating, since there is a legitimate basis to proscribe that conduct. See *Cameron v. Johnson*, 390 U.S. 611, 616-17 (1968); *Cox v. Louisiana*, 379 U.S. 559, 564 (1965). See also *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 67 (1973) (rejecting the claim that "a 'live' performance of a man and a woman locked in a sexual embrace at high noon in Times Square is protected by the Constitution because they simultaneously engage in a valid political dialogue").

Indeed this Court's explication of the right of expressive association makes clear that it is not implicated merely because loiterers sometimes speak to each other. The Court has described this right as "the ability and the opportunity to combine with others to advance one's views" (*New York State Club Association*, 487 U.S. at 13), and as providing "protection to collective effort on behalf of shared goals" (*Roberts*, 468 U.S. at 622). The Court has made clear that the right of expressive association is infringed only when governmental action inhibits a group's ability to advocate its particular views on social and political questions. See *New York State Club Association*, 487 U.S. at 13-14; *Rotary Club*, 481 U.S. at 548-49; *Roberts*, 468 U.S. at 627-28. Plainly nothing remotely like that is present here. To the extent that street gangs and their associates wish to demonstrate, solicit contributions, or pass out literature promoting their favorite causes, they may do so with impunity, since these activities have an "apparent purpose." While the ordinance may be applied to disperse groups of loiterers who happen to be discussing public affairs, the weather, sports, or any other subject within the ambit of First Amendment protection, that does not mean that it infringes the right of expressive association. After all, the dance-hall ordinance sustained in *Stanglin* prevented those excluded from youth dances

from discussing these same subjects with those who could attend the dances, and the Court held that it infringed no First Amendment right.

Second, respondents claim that the ordinance reaches overt advocacy activity, such as "members of a community outreach group . . . attempting to persuade a gang member to leave his gang." Resp. Br. 59. The limitations on the ordinance's application to such activities, however, are plain from its text. Conduct falls within the ordinance's definition of "loiter" only when an individual's "purpose" for "remain[ing] in any one place" is not "apparent." When it is manifest to an observer why individuals are not moving along, then, those individuals are not subject to the ordinance. Thus when a group is holding protest signs outside of City Hall, or leafletting or soliciting passers-by at a particular location, its purpose is apparent, as we explain above. But when an officer can observe no more than that individuals are talking to each other, he cannot know why they have chosen to "remain in any one place" rather than stroll as they talk; hence their purpose for staying put is not "apparent." Thus it should be plain that most efforts by community advocates to counsel or proselytize gang members will not amount to loitering under this ordinance, just as any crowd that an officer observes listening to a speech would have an "apparent purpose"; indeed even the Illinois Supreme Court did not suggest that the ordinance reached such activities. Even so, there may be cases in which a counselor is sufficiently subtle in his methods that his purpose would not be apparent to a passing police officer. But as we explain in our opening brief, this type of hypothesizing does not make for substantial overbreadth. See Pet. Br. 22-23.

There is, of course, a wealth of experience under the gang loitering ordinance—as we explain in our opening brief, it was applied tens of thousands of times. Yet respondents cannot identify even a single instance in which it disrupted any advocacy activity. While respondents hypothesize that the ordinance reaches a "gulf of expressive opportunities" (Resp. Br. 64), it surely is not asking too much to expect them to provide even a single concrete instance of its application to protected activity, especially since the Court is properly "reluctant, in any event, to invalidate legislation 'on the basis of its hypothetical application to situations not before the Court.'" *National Endowment for the Arts v. Finley*, 118 S. Ct. 2168, 2177 (1998) (quoting *FCC v. Pacifica Foundation*, 438 U.S. 726, 743 (1978)). Nor does the legislative record lend substance to an overbreadth claim. The testimony before the City Council did not suggest that the neighborhoods in which this ordinance was to be applied were overrun with gang counselors and ministers—it was the intimidating presence of gangs that made for everyday reality in these neighborhoods, and those gangs, of course, were typically unaccompanied by counselors and ministers.

The most one can say about the impact of the gang loitering ordinance on associational activity is that, by granting the police authority to disperse groups containing gang members, it increases the legal risks confronting those who loiter with gang members. But as we have explained, this ordinance does not target constitutionally protected associational activity; hence the government is not constitutionally compelled to refrain from creating any burden or chill on this type of "association." And by discouraging loitering with gang members, the ordinance does not create "[g]uilt by association" as respondents claim (Resp. Br. 62); rather, it inhibits conduct that poses very real threats to health and safety—if nothing else, loitering with criminal street gang members increases the risk that those loitering will be shot by rival gangs, as the testimony before the City Council and the statistics that we have supplied to the Court show. Thus, if this ordinance inhibits conduct that all too often invites violence, directed both at gang members and those who happen to be near them, that is an inhibition for which we do not apologize.

2. *The gang loitering ordinance is a permissible regulation of loitering.*

We also explain in our opening brief that the gang loitering ordinance complies with the standards for permissible regulation of the time, place, or manner of speech, assembly, and association. See Pet. Br. 24-28. On this point, respondents first complain that the gang loitering ordinance is invalid because a permissible regulation must be "unconnected to association." Resp. Br. 66. But this is demonstrably incorrect—a regulation of the time, place, or manner of speech, assembly, or association is typically directed at just those activities. For example, the permit procedure upheld in the seminal case of *Cox v. New Hampshire*, 312 U.S. 569 (1941), targeted public meetings, parades, and other protected activities for special regulation. See *id.* at 571. The ordinance upheld in *Frisby v. Schultz*, 487 U.S. 474 (1988), similarly, was aimed at residential picketing. See *id.* at 476-77. Most pertinent for present purposes is *Roberts*, in which the Court imposed no requirement that regulation of associational activity be "unconnected to association." Rather, the Court held, "[i]nfringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." 468 U.S. at 623.

Next, respondents claim that the ordinance is not content-neutral because "[p]ersons subject to the ordinance are identified by their status as purported gang members." Resp. Br. 66. But the prohibition on content-based regulation does not extend to utilizing status as the basis for a regulation—as we have just explained, the requirement is instead that the regulation be "unrelated to the suppression of ideas." For example, *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), involved a regulation directed at expressive activities—special zoning rules governing establishments offering sexually-oriented entertainment. The Court found those rules to be content

neutral because they were based on the effects that such establishments had on the surrounding neighborhood rather than the suppression of ideas or viewpoints. See *id.* at 46-50. Here, of course, the regulation at issue is not premised on the content of gang members' speech, but rather on the effect that gang loitering has on the community. Moreover, "no evidence has been . . . introduced to indicate whether the ordinance has been enforced in a discriminatory manner or with the aim of inhibiting unpopular speech." *Hoffman Estates*, 455 U.S. at 503.

Respondents also complain that the ordinance is not appropriately tailored because the City could utilize other laws to curb the harmful effects of gang loitering. See Resp. Br. 66-67.[3] What respondents ignore, however, is the City Council's findings on the utility of those other laws. In particular, as we explain in our opening brief, because gang members rarely break other laws in the presence of the police, it is frequently impossible to enforce those laws without relying on the testimony of the residents of gang-ridden areas—an unsatisfactory approach for many reasons. See Pet. Br. 3-4.[4] Indeed one thing that comes quite clear from the legislative record is the

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[3] On this point, respondents rely primarily on *DeJonge v. Oregon*, 299 U.S. 353 (1937), but the statute invalidated in that case was not content neutral; it criminalized advocacy of unlawful acts (see *id.* at 356-57) and had been applied to mere participation at a meeting of the Communist Party (see *id.* at 365-66).

[4] Amici Chicago Alliance for Neighborhood Safety, *et al.*, suggest that Chicago can avoid the problems of utilizing civilian witnesses by making arrests based on confidential tips. See CANS Br. 10-11. That approach is unsatisfactory for many reasons, not the least of which is that the absence of any witness willing to testify at trial will make it impossible to secure convictions, and no doubt lead to claims that these arrests are being used as an inappropriate method of summary punishment rather than to initiate bona fide prosecutions. In fact the City of Chicago is currently subject to a permanent injunction in *Nelson v. City of Chicago*, No. 83 C 1168 (N.D. Ill), stemming from its practice in the early 1980s of permitting police officers to make arrests when it did not intend to pursue prosecution of the arrestees.

widespread frustration with the enforcement of existing laws, largely because of the ability of gangs to obtain advance warning that the police are on the way and to cease selling narcotics and violating other laws once the police arrive. *E.g.*, Supp. R. I at 50-51, 68, 79-80, 138-40; Supp. R. II at 33, 38.

The testimony before the City Council also established that gang loitering has destructive effects regardless of whether gang members are breaking other laws within view of law-abiding witnesses as they loiter. For example, the testimony showed that when groups known to be gang affiliated loiter in commercial areas, law-abiding persons are frequently afraid to patronize nearby businesses, understanding as they do that gang members rarely like law-abiding persons in their immediate vicinity; as a result business activity is depressed in these areas and investment in them discouraged. *E.g.*, Supp. R. I at 59-60, 63-65, 75, 87, 97-98, 104, 112; Supp. R. II at 124-25, 171. To revitalize these areas, then, an anti-loitering ordinance is not only a more straightforward approach than attempting to assemble criminal cases against loiterers under other laws, but it also signals to law-abiding residents in a far more direct way that the authorities are able to make an impact on the streetscape.[5]

Finally, respondents claim that the ordinance does not leave open ample alternative channels for association, although they rely on a proposition plainly inapplicable here: "When expression and association are banned in specific locations other than quintessential public forums, the public streets are often the only alternative." Resp. Br. 67. Here, of course, the ordinance has no effect on associational activity indoors, and hence the public ways are not the only alternative available. Even the public ways remain available to gang members and those who

[5] In addition to the authorities we cite in our opening brief on this point (Pet. Br. 15-16), see Dan N. Kahan & Tracey L. Meares, *The Coming Crisis of Criminal Procedure*, 86 Geo. L.J. 1153, 1163-65 (1998).

wish to meet with them as long as they move on when directed to do so. Areas not designated for ordinance enforcement under General Order 92-4 remain available as well. On this last point, respondents complain that the Chicago Police Department did not announce which areas it had designated under the Order (Resp. Br. 24-25), but of course that does not change the fact that under the General Order, loiterers were left undisturbed in many parts of Chicago.[6]

B. The Gang Loitering Ordinance Contains Appropriate Standards For Its Enforcement.

Although respondents barely acknowledge the point, it is well settled that absent First Amendment overbreadth, a law can be struck down on its face only if it is invalid in all its applications. *E.g.*, *Reno v. Flores*, 507 U.S. 292, 300-01 (1993); *United States v. Salerno*, 481 U.S. 739, 745 (1987). We now explain why respondents' facial challenge does not satisfy this demanding standard.

1. *The ordinance provides fair notice of what it prohibits.*

On the first prong of vagueness inquiry, whether a challenged law "define[s] the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited" (*Kolender v. Lawson*, 461 U.S. 352, 357 (1983)), respondents contend that persons cannot know "whether they are at all times adequately manifesting to others their purpose for being present in public." Resp. Br. 19. Whatever ambiguity lies in the definition of "loitering," however, it is plainly not vague in all, or even most, of its applications, as even the Illinois Supreme Court acknowledged. See Pet. App. 9a (finding "a common and accepted meaning of the word 'loiter' ").[7]

[6] Respondents also suggest that too many areas were designated (Resp. Br. 25), but of course resolution of this claim must await development of an appropriate record, should respondents choose to pursue a challenge to the ordinance as applied.

[7] We are puzzled by respondents' claim that the Illinois Supreme Court's failure to adopt a "limiting construction" of the ordinance

There are in fact at least two large classes of cases in which the application of the ordinance will be crystal clear. On one hand, as we explain above, in many cases police officers will readily discern why individuals—ranging from pickets to those standing at marked bus stops—are staying in any one place, and hence will know that such persons are not loitering. On the other hand, there will also be many instances in which individuals will know that their conduct provides observers with no apparent indication of why they are staying in one place—especially when it is gang members that are loitering. As we explain above, the testimony before the City Council made clear that gang members and their hangers-on frequently occupy the public ways in order to sell narcotics or break other laws, but when the police arrive they instead appear to be innocently loitering. Such persons surely know that they have no "apparent purpose"; to the contrary, their "purpose" is to prevent the police from learning why they are on the public ways. And because respondents do not even attempt to show that the ordinance is vague in either of these circumstances, they cannot hope to prevail under a test that requires them to demonstrate that the ordinance is invalid in all its applications.[8]

(Resp. Br. 20 n.13) has some significance for this case. The court acknowledged that the term "loiter" has a common meaning; its holding was instead premised on its view that an order to loiterers to move on fails to provide sufficient notice under this Court's dicta in *Shuttlesworth*. See Pet. App. 12a-14a. As we explain below, that was error. And in any event, even respondents do not contend that the decision below rests on an adequate and independent state-law determination that the ordinance has no ascertainable meaning. As we explain in our opening brief, a state-law basis for decision is present when a state court's opinion contains an express statement that its decision rests on state law, and no such statement can be found in the decision below. See Pet. Br. 1-2 n.1.

[8] Respondents suggest that the lower courts have uniformly invalidated loitering laws for lack of fair notice (Resp. Br. 18-19), but in fact the lower courts have been sharply divided. See Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities and the New Policing*, 97 Colum. L. Rev. 551, 608-34 (1997).

In any event, we acknowledge that there will be instances in which individuals will not realize that their purpose for staying put is not apparent to others (or will not know that they are loitering with a gang member). When that is the case, however, the requisite notice is still provided: it comes from the order to disperse that the ordinance requires before an arrest can be made. Indeed even respondents concede that "persons will know what they need to do to avoid arrest under the ordinance —*i.e.*, obey the order." Resp. Br. 26.

Because this law proscribes only knowing disobedience to a police order, it does not "trap the innocent." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). And there is no prohibition on the use of police directives to notify persons of what the law forbids; in *Cox v. Louisiana*, for example, the Court upheld a statute prohibiting demonstrations "near" a courthouse because demonstrators could rely on the police to tell them "how near the courthouse a particular demonstration can be . . . ." 379 U.S. at 568. Thus respondents' argument that "[a] law that prohibits remaining in a place without an 'apparent purpose' is so amorphous that it provides no standard at all" (Resp. Br. 18) is not even properly directed at the gang loitering ordinance. The ordinance does not prohibit loitering; it prohibits disobedience to a police order to move along. That is hardly an "amorphous" offense.

The claim that the police cannot determine who is "loitering" goes, at best, to the question whether the ordinance contains standards for its enforcement, not to the question of fair notice. Under this ordinance, the order to disperse gives notice in the same way that "no parking" signs give the public notice of where parking is forbidden—notice that is quite clear even if the public is unaware of the standards that the authorities use to decide where to forbid parking. And this type of notice —notice of what the law forbids—is the only type of notice the Constitution requires. See, *e.g.*, *United States v. Lanier*, 117 S. Ct. 1219, 1225 (1997) (due process

requires that no one "shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed") (quoting *Bouie v. City of Columbia*, 378 U.S. 347, 351 (1964), and *United States v. Harriss*, 347 U.S. 612, 617 (1954)); *Kolender*, 461 U.S. at 357 (due process requires that "a penal statute define a criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited"); *Grayned*, 408 U.S. at 108 ("we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly"); *Colten v. Kentucky*, 407 U.S. 104, 110 (1972) (due process requires "fair warning that certain kinds of conduct are prohibited"). Under this ordinance, of course, it is not illegal to loiter; the ordinance proscribes loitering only after receipt of a police order to move along. Thus due process requires no warning that "loitering" is illegal in Chicago—because it is not. Due process requires only fair notice of what conduct violates the law. The police order to disperse provides that notice.

For this reason, respondents' complaint that our submission is "an end-run around this principle of fair warning" because it permits a person to "be told to disperse before being arrested and prosecuted for underlying conduct that itself is insufficiently defined" (Resp. Br. 26), misses the mark. The only "conduct" for which one can be "arrested and prosecuted" under this ordinance is disobedience to a police order, and by telling individuals that they must disperse, the order provides the fair notice the Constitution requires. As we have explained, the Constitution requires notice only of the conduct for which one can be "arrested and prosecuted," not notice of every circumstance that might authorize the police to issue orders to those they encounter in public. Nor does it aid respondents to claim that people should know "what they need to do . . . to avoid being dispersed from public places." Resp. Br. 27. The Constitution in fact secures no right "to avoid being dispersed" when one has no apparent purpose. As we explain in our opening brief and reiterate here, neither the First Amendment, substantive due process, nor any other principle of constitutional law secures a right to loiter. Thus when people are told to move along, they are deprived of no constitutional entitlement.

Of the authorities on which respondents rely, only two cases involved laws that required disobedience to a police order before an arrest could be made.[9] The first is *Shuttlesworth*, but the dicta on which respondents rely, as we explain in our opening brief and reiterate above, says only that a law enabling the police to order anyone standing in the public ways to move on would permit suppression of First Amendment activity and arbitrary and discriminatory enforcement. This dicta says nothing remotely helpful to respondents on the issue of fair notice. A law requiring persons to obey all police orders may have many defects—including those identified in the *Shuttlesworth* dicta—but a failure to give persons notice of what they are expected to do is not among them. The other case that respondents cite is *Wright v. Georgia*, 373 U.S. 284 (1963), but again the constitutional infirmity identified in that case had nothing to do with a lack of fair notice. The order to leave a public park at issue in *Wright* was given "to enforce racial discrimination in the park. For this reason the order violated the Equal Protection Clause of the Fourteenth Amendment." *Id.* at 292. And, of course, when a law authorizes the police to enforce racial segregation it fails to observe "the boundary between constitutionally permissible and constitutionally impermissible applications of the statute." *Ibid.*

Some of respondents' amici claim that the dispersal order is unclear because it does not delineate precisely

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[9] Of the other cases on which respondents rely, *Thornhill v. Alabama*, 310 U.S. 88 (1940), considered a statute prohibiting loitering near a business in order to discourage others from patronizing it (*id.* at 91-92); *Palmer v. City of Euclid*, 402 U.S. 544 (1971), involved a law applicable to anyone found in public at night (*id.* at 544); and, as we explain in our opening brief, *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972), also involved a law that could reach anyone found outdoors at night (see Pet. Br. 31).

how far loiterers must go in order to "disperse and remove themselves from the area." See NBPA Br. 13-14; CANS Br. 20-25. But of course the Constitution does not require laws to be worded with "mathematical certainty" (*Grayned*, 408 U.S. at 110); laws need only utilize "terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with." *United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548, 579 (1973). Here, of course, persons using common sense can understand what an order to "disperse and remove [your]selves from the area" means—if they remain in proximity to each other and have traveled no meaningful distance, they have plainly not complied with the order, and surely cannot claim surprise if they are arrested. In *Cox v. Louisiana*, for example, the Court upheld a statute prohibiting demonstrations "near" a courthouse against vagueness attack, reasoning that it was not vague "at least as applied to a demonstration within the sight and hearing of those in the courthouse." 379 U.S. at 568. Here, as well, anyone who remains within sight and hearing of those at the location from which he was ordered to leave surely cannot complain of vagueness. Indeed amici offer not even a single instance from the tens of thousands of cases brought under the ordinance in which an individual moved on for any appreciable distance yet still was arrested. And no respondent—including those whose cases were tried—ever claimed that he was confused about how to comply with an order to disperse.[10] An order to "disperse and remove [your]-

[10] Amici speculate that persons must be confused about how to comply with the ordinance because of the large number of arrests made. See CANS Br. 22. The large number of arrests is more likely a consequence of the tenacity with which gang members remain in lucrative locations on the public ways in order to sell narcotics and intimidate potential rivals, since occupying such locations is central to the revenues that gangs derive from the drug trade. See generally *e.g.*, Jeffrey Fagan, *Gangs, Drugs, and Neighborhood Change*, in *Gangs in America* 49-73 (C. Ronald Huff ed. 1996); Wesley G. Skogan, *Disorder and Decline* 29-32 (1990); Irving A. Spergel, *The Youth Gang Problem: A Community Approach* 43-54 (1995).

selves from the area" uses "words of common understanding" (*Boos v. Barry*, 485 U.S. 312, 332 (1985)); hence it provides fair notice.[11]

The decided cases illustrate our point—as long as the person receiving an order, by exercising a modicum of common sense, can understand what is required of him, that order should be sustained. The police order to move on upheld in *Colten*, for example, did not contain precise geographical guidance, but of course Colten could have discerned that he should have moved far enough so that he was no longer near the officer who was writing a traffic ticket. See 407 U.S. at 110. Similarly, in the companion case of *Cox v. Louisiana*, 379 U.S. 536 (1965), the Court found no infirmity in a breach of the peace provision criminalizing "a refusal to move on after being ordered to do so," characterizing it as "narrow and specific." *Id.* at 551. In fact, if the Constitution required people to be given specific guidance about how far they must go in order to "disperse" or "move on," the dispersal statute upheld in *Boos* should have been struck down, and none of the dispersal laws inventoried by amici Ohio, *et al.*, could survive.[12]

[11] This same point answers amici's related contention that the ordinance's application to persons loitering "with" gang members (Pet. App. 61a) is impermissibly vague. See NBPA Br. 11-12. Certainly persons commonly understand what it means to be "with" someone else. And, in any event, even if one is unsure about whether he is loitering "with" gang members, he still need not fear arrest unless he disobeys a police order to move on.

[12] If amici mean to argue that due process requires laws to establish geographical boundaries in which specified conduct is prohibited, that argument was rejected in *United States v. Mazurie*, 419 U.S. 544 (1975). In that case, the Court upheld a statute prohibiting unlicensed liquor sales in "Indian country," excluding from that definition areas within reservations containing "non-Indian communities." *Id.* at 547. The Court rejected the claim that due process required the statute to utilize "a geographical area with precise boundaries" (*id.* at 552), concluding that persons could

Respondents also attack the sufficiency of the dispersal order to supply fair notice, claiming that persons have no prior notice that dispersal is "authorized under the ordinance" (Resp. Br. 26) and adding that "a person has a right to adequate notice so that he may determine whether the officer is misapplying a law" (*id.* at 27). But there is no support for respondents' novel theory that persons have a right to some sort of prior notice so that they can decide for themselves if the police are authorized to issue an enforceable order. As we explain above, the requirement of fair notice entitles people to notice of what the law forbids; it contains nothing like a requirement that people receive some type of advance warning that the police have determined that they are authorized to issue an enforceable order. In *Boos v. Barry*, for example, the Court upheld an ordinance that permitted police to order any group within 500 feet of a foreign embassy to disperse if they reasonably believe that normal embassy activities have been or are about to be disrupted, even though the ordinance did not identify "the prohibited quantum of disturbance," much less require the police to warn demonstrators that they had reached that "quantum." See 485 U.S. at 331-32. Similarly, *Cox v. Louisiana*, as we explain above, upheld a statute prohibiting demonstrations "near" a courthouse, and, far from condemning "administrative discretion to construe the term 'near,'" made clear that demonstrators should "rely on [the police's] administrative interpretation of how 'near' the courthouse a particular demonstration might take place . . . ." 379 U.S. at 569.

The police order itself provides notice that the officer issuing it has determined that he is authorized to disperse loiterers; thus the only conceivable purpose for providing persons with advance notice that a police officer believes that they are loitering in a group with gang members

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reasonably understand the statutory phrase by reference to the racial identity of those within the general vicinity of an establishment. See *id.* at 552-53.

would be to permit them to dispute that point with the officer, and the place for such disputes is the courtroom, not the street. Moreover, if the police must give persons an opportunity to debate them before they may issue an enforceable order to disperse, the police would presumably be required as well to evaluate loiterers' explanations for their conduct, thereby making precisely the sort of inherently subjective credibility determinations about individuals' purpose and intent that the Court condemned in *Kolender*. See 461 U.S. at 358-60. Such an approach would also be inconsistent with this Court's Fourth Amendment jurisprudence, which, as we explain in our opening brief, permits officers to detain or arrest individuals based on their reasonable beliefs (Pet. Br. 36-37), without first requiring them to give individuals some type of opportunity to "determine whether the officer is misapplying a law" (Resp. Br. 27).

We explain in Part I.B.2 below that the ordinance supplies the police with sufficient standards governing their authority to issue orders to move on. That being the case, the requirement of fair notice does not obligate the police to provide loiterers with any type of prior notice of their determination that those standards have been satisfied. As long as persons are given reason to understand that if they fail to move along they court arrest, they have "fair warning that certain kinds of conduct are prohibited." *Colten*, 407 U.S. at 110. And because it is clear that the police order to disperse gives people notice of what they are expected to do, it becomes plain that respondents' real objection to this ordinance is not to its vagueness, but its scope—they complain that people will be ordered to move along even when they are engaged in "everyday, innocent behavior." Resp. Br. 19. That is an objection to the rationality of the ordinance, not its clarity, and we address it in Part II below. When it comes to vagueness, however, there is no substance to respondents' complaints; an ordinance that requires disobedience of a police order before an arrest can be made is plainly no trap for the unwary.

2. *The ordinance does not authorize arbitrary or discriminatory enforcement.*

On the second and "more important aspect of vagueness doctrine" (*Kolender*, 461 U.S. at 358), respondents confine themselves to the single claim that there are no "guidelines whatsoever for" determining when individuals are loitering. Resp. Br. 30. But the concept of "remain[ing] in any one place with no apparent purpose" (Pet. App. 61a) surely is not wholly subjective and indeterminate—indeed as we point out above, even the Illinois Supreme Court acknowledged a "common and accepted meaning" of the term "loitering."

At a minimum, of course, the ordinance grants the police no discretion to enforce it against people who are moving along, or who obey dispersal orders. And even among those who do remain in any one place, the concept of "no apparent purpose" has meaningful content. As we explain above, gang members who pretend to be innocently loitering when the arrival of the police disrupts their criminal activities surely have "no apparent purpose" —in fact they are doing all they can to ensure that their "purpose" is not "apparent" to the police. That there will be close cases—such as the occasional gang counselor whose purpose is not apparent—does not establish that this definition is "impermissibly vague in all of its applications." *Hoffman Estates*, 455 U.S. at 497.[13] A law is not invalid on its face merely because "doubts as to the applicability of the language in marginal fact situations may be conceived . . . ." *United States v. Powell*, 423 U.S. 87, 93 (1975).

But we need not rely on the ordinance's definition of "loiter" to explain why it contains a principled basis for enforcement. That is because the ordinance permits en-

[13] The examples cited by the Illinois Supreme Court (Pet. App. 10a) and endorsed by respondents (Resp. Br. 20) in fact illustrate this point—persons hailing passing taxis, panting joggers gasping for breath, and pedestrians huddled at a doorway taking shelter from a storm plainly have an apparent purpose for staying put.

forcement only when an officer observes that a group of loiterers contains "a person whom he reasonably believes to be a criminal street gang member." Pet. App. 61a. Respondents do not even attempt a claim that the police determinations of gang membership are inherently subjective; nor did the Illinois Supreme Court embrace such a conclusion. We explain in our opening brief that gang membership can be objectively ascertained (Pet. Br. 35-36), and as the record in the cases of the respondents who were convicted at trial make clear, there are a variety of ready and quite objective means of determining gang membership available to Chicago police officers, including merely asking loiterers about their affiliations, which gang members appear to be all too willing to trumpet.[14]

Instead of attacking as vague the requirement that the police reasonably believe that a group of loiterers contains a gang member, respondents merely echo the Illinois Supreme Court's position that this "does absolutely nothing to cure the imprecisions of the definition of the 'loitering' element of the crime." Resp. Br. 31 (quoting Pet. App. 16a). Of course, if it were the case that the use of "loitering" as an element of an offense were sufficient to doom a law regardless of the limitations on enforcement discretion imposed by the other elements of the offense, all loitering laws would be invalid. Yet in

[14] The closest respondents come to complaining about this aspect of the ordinance is to suggest that the evidence at the trial of respondent Morales indicates that the police make arrests even in the absence of evidence that a group of loiterers contains a gang member. See Resp. Br. 31-32 n.25. This claim, of course, does not attack the ordinance on its face, and its resolution must await an appropriate record. If the arresting officer in that case lacked a reasonable basis for his belief that gang members were loitering, of course, that would not establish the ordinance's vagueness, but only that Morales' conviction should be reversed for insufficient evidence of one of the elements of the offense. For his part, Morales has not even made such a claim. And in any event, the record in Morales' case lends scant support to respondents' theory, since Morales admitted in his own testimony that he knew he was with criminal street gang members. See Morales Tr. 19, 22.

Kolender, the Court made clear that a loitering law authorizing detention on reasonable suspicion under the standard of *Terry v. Ohio*, 392 U.S. 1 (1968), would be valid because that standard provides "neutral limitations on the conduct of individual officers." 461 U.S. at 361 (quoting *Brown v. Texas*, 443 U.S. 47, 51 (1979)). Thus the other elements found in a loitering law are plainly important—the use of loitering as one element of an offense is not alone sufficient to condemn a law on grounds of vagueness.[15]

In fact it is well settled that the vagueness of some elements can be cured by limitations on enforcement discretion contained in others. In *Hoffman Estates*, for example, it was a scienter requirement that saved a provision criminalizing the sale of items "marketed for use" with illegal drugs. See 455 U.S. at 502. See also *Posters 'N' Things, Ltd. v. United States*, 511 U.S. 513, 526 (1994) (federal drug paraphernalia statute's scienter requirement "assists in avoiding any vagueness problem"). Similarly, in *Grayned*, the Court sustained the anti-noise ordinance at issue because one of its elements limited its reach to noise that disrupts normal school activities. See *id.* at 110-11. See also *Boos*, 485 U.S. at 331-32 (upholding ordinance restricting demonstrations near embassies because one required element was a reasonable belief that the activity would disrupt the embassy). Indeed, we suspect that a whole host of laws—such as prohibitions on disturbing the peace or creating a nuisance—would be impermissibly vague if only their broadest elements were considered in isolation.

Thus, respondents' claim that the gang loitering "ordinance provides no standards by which a police officer can determine what conduct it prohibits" (Resp. Br. 29-30) is insupportable. Not only does the ordinance grant no authority over those who are moving along, who have

[15] Indeed even respondents suggest that some laws employing loitering as an element of an offense are valid, although they hedge considerably on this point. See Resp. Br. 12 & n.5, 19 n.12, 22 n.16.

an apparent purpose, or who obey orders to disperse, but it can be used only when an officer has an objectively reasonable basis to identify a loiterer as a gang member. Targeting an anti-loitering law at such groups thus does not "permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.'" *Kolender*, 461 U.S. at 358 (quoting *Smith v. Goguen*, 415 U.S. 566, 575 (1974)). Rather, enforcement is undertaken under this ordinance against only those groups that the City Council found were most likely, if permitted to loiter with impunity, to commit crimes, invite violence from other gangs, intimidate law-abiding persons, and drive down property values. The judgment that these groups warrant a targeted anti-loitering effort, coupled with the requirement that arrests occur only when a police order is disobeyed, means that the "City Council has made the basic policy choices, and has given fair warning as to what is prohibited." *Grayned*, 408 U.S. at 114. The ordinance is not, therefore, impermissibly vague.

II. THE GANG LOITERING ORDINANCE DOES NOT OFFEND SUBSTANTIVE DUE PROCESS.

Going well beyond the holding of the Illinois Supreme Court, respondents assert that our Constitution recognizes a fundamental right to stand still, which they anchor in either the Eighth Amendment or in the unenumerated rights protected by substantive due process. Respondents' theory would presumably require strict judicial scrutiny of every loitering law in the country. That theory should not find favor in this Court.

A. The Gang Loitering Ordinance Appropriately Advances Legitimate Governmental Interests.

Respondents argue that the gang loitering ordinance triggers strict judicial scrutiny because it infringes a "fundamental right of free movement in public places and forums." Resp. Br. 33 (footnote omitted). Not only is this claimed right inconsistent with the decisions of this Court, such as *Stanglin* and *Colten*, upholding the au-

thority of the government to regulate where individuals are permitted to be, but it also reflects a serious misreading of this Court's cases involving fundamental constitutional rights. To be sure, we do not doubt that the gang loitering ordinance affects a liberty interest within the ambit of the Due Process Clause. As the Court observed in *Kolender*, a loitering law, by granting regulatory power over those standing on the public ways, "implicates consideration of the constitutional right to freedom of movement." 461 U.S. at 358. But that is very different from saying that there is a fundamental right to loiter requiring strict scrutiny of every loitering law. And when a challenged enactment implicates a constitutionally protected liberty interest, but impinges on no fundamental right, it should be upheld as long as it is rationally related to a legitimate government interest. *E.g., Washington v. Glucksberg*, 117 S. Ct. 2258, 2271-72 (1997).

This Court has never proclaimed a fundamental right of "free movement." Rather, it has read the line of cases on which respondents rely to recognize as fundamental the "right of interstate travel." *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 254 (1974). This "constitutional right to travel, or more precisely, the right of free interstate migration" (*Attorney General v. Soto-Lopez*, 476 U.S. 898, 902 (1986)), is plainly inapplicable here—loitering is in no sense interstate travel. Nor does the Court's right-to-travel jurisprudence suggest that there is a sound basis to extend this right to loiterers. The Court has explained that the right to travel is fundamental because the nature of the union achieved by our Constitution presupposes that the residents of each State have a right to pass through or move to any other. See, *e.g., Soto-Lopez*, 476 U.S. at 901-03; *United States v. Guest*, 383 U.S. 745, 757-59 (1966). But the right to pass through or take up residence in another State in no way suggests a right to loiter once one arrives.

In fact, the right of travel the Court has recognized is not infringed by "a purely intrastate restriction" on movement within a jurisdiction, even if the restriction

happens to be applied "against travelers from other States." *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 277 (1993).[16] And even if wholly intrastate travel were constitutionally protected, loiterers, of course, are not "traveling" at all.[17] This doubtless explains why the historical record of respecting the right to travel correctly identified by respondents (see Resp. Br. 34-38) coexists with an equally substantial historical record of regulating loitering (see Pet. Br. 41; WLF Br. 12-20). History thus makes clear that the right to travel has never been thought to extend to loitering. At best, as we explain in our opening brief, loitering is an "amenity of life," but legislatures frequently must regulate the common amenities of life when the liberty interests of different constituencies come into conflict. See Pet. Br. 42-43.

Respondents' only attempt to explain why the right to travel reaches loiterers—who are subject to this ordinance only when they refuse to "travel" in response to a police order—is to observe that the Court has understood the First Amendment to include a right not to speak or associate. See Resp. Br. 35 n.28. But this First Amendment principle has no application here. The First Amendment's protection for "freedom of speech" necessarily includes

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[16] Respondents claim that *Kent v. Dulles*, 357 U.S. 116 (1958), and *Aptheker v. Secretary of State*, 378 U.S. 500 (1964), somehow held that wholly intrastate enactments such as anti-loitering laws implicate fundamental rights. Yet even respondents acknowledge that these cases involved foreign and not intrastate travel. See Resp. Br. 38-39. And in any event, this Court has not read *Kent* and *Aptheker* to recognize any fundamental right; the Court has since held that Congress has plenary power to restrict travel abroad as long as restrictions are not based on the political beliefs or affiliations of those seeking to travel. See, *e.g., Regan v. Wald*, 468 U.S. 222, 240-42 (1984); *Zemel v. Rusk*, 381 U.S. 1, 13-17 (1965).

[17] To support their request for strict judicial scrutiny, respondents rely on cases in which challenged enactments authorized the government to institutionalize or imprison individuals. See Resp. Br. 49 n.42. But unlike the right to stand in one place, the right not to be taken into custody absent conviction of a crime is fundamental. See, *e.g., Foucha v. Louisiana*, 504 U.S. 71, 80 (1992); *Salerno*, 481 U.S. at 750.

protection from governmental coercion that forces one to speak: "one important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say.'" *Hurley*, 515 U.S. at 573 (quoting *Pacific Gas & Electric Co. v. Public Utilities Commission*, 475 U.S. 1, 16 (1986) (plurality opinion)). No comparable constitutional value is served by loitering —it does not bind the states together as does interstate travel, nor does it advance any other fundamental constitutional value to which state or local governments cannot be expected to be sensitive. And when that is the case, "[t]here is no reason to think the democratic process will not strike the proper balance . . . ." *Glucksberg*, 117 S. Ct. at 2303 (O'Connor, J., concurring).

Respondents cannot explain why the Court upheld restrictions on the allegedly fundamental right of "free movement" in *Stanglin* and *Colten*, among other cases, without identifying any fundamental constitutional right; and so they eventually concede that even in their view a fundamental right is implicated only "where a restriction imposes some nontrivial burden on movement." Resp. Br. 41. Yet even if that were the test, respondents do not explain why this ordinance imposes an impermissible burden on "movement"—gang members remain free to loiter alone, or in groups as long as they move along when asked to do so, or when they are in areas not designated for ordinance enforcement, and they can walk anywhere they please, alone or in groups. Given the weighty justifications for this ordinance, the modest burden it imposes is hardly impermissible. After all, the Constitution prohibits only undue or unwarranted restrictions on even fundamental rights. *E.g.*, *Planned Parenthood v. Casey*, 505 U.S. 833, 875-79 (1992) (opinion of O'Connor, Kennedy & Souter, JJ.) (only undue or unwarranted burdens on the right to abortion are impermissible); *Sosna v. Iowa*, 419 U.S. 393 (1975) (one-year residency requirement to obtain a divorce was sufficiently justified and did not impermissibly infringe the right to travel).

Respondents also suggest that the right to loiter is "implicit in the concept of ordered liberty." Resp. Br. 40, 42. The testimony before the City Council, as well as its findings, belies that claim. Neighborhoods where law-abiding persons feel imprisoned in their own homes and frustrated with the inability of the government to solve that problem cannot enjoy the fruits of "ordered liberty." Indeed this ordinance is justified in large part as an effort to secure the right of law-abiding persons to "free movement" in their own communities.

As we explain in our opening brief (Pet. Br. 14-17, 41-42), recognition of a substantive due process right to loiter would inappropriately circumscribe potentially valuable anticrime measures. On this point, respondents attempt to dismiss the statistics contained in the report we have lodged with the Court. First, they observe that gang crime increased in 1993 and 1994 (Resp. Br. 46), but they forget that the ordinance was implemented only gradually, as officers were trained in this new tool and areas of Chicago were slowly designated for ordinance enforcement. In fact, more than half of all gang loitering arrests occurred in 1995, the final year of enforcement, and in that year dramatic declines in gang crime occurred. But in 1996, not only did gang-related homicide rise while the overall homicide rate fell, but the same pattern was observed for aggravated battery with a firearm; and the spectacular 1995 decline in drive-by shootings was largely halted. Respondents also observe that gang-related homicide dropped in 1997 (*ibid.*), but that was in comparison to the increase in gang-related homicide in 1996 that accompanied the end of gang loitering enforcement. Moreover, gang-related shootings and drive-by shootings both rose in 1997, indicating that the dip in gang homicide was more a factor of poor marksmanship than fewer shots fired. Even more distressing, during the first eight months of 1998, gang-related homicides and aggravated battery with a firearm again rose more rapidly than the general

rate for those crimes, and drive-by shootings rose as well.[18] Thus, while respondents believe that enforcement of other laws can stem the tide of gang crime, the statistics do not bear them out.

Of course, respondents are correct that determining the cause of the impressive decline in gang crime in 1995 is perilous business. Our point is not to express certitude about the import of the statistics, but rather to make clear that the holding respondents seek would end experimentation with a potentially valuable tool.[19]

To explain why the ordinance is irrational, respondents confine themselves to three claims. First, they complain that orders to disperse under the ordinance can be directed at anyone loitering with gang members, even those not in a gang. See Resp. Br. 44-45. But of course non-gang members are at risk when they loiter with gang members, whose very presence in public is often an invitation to violence. And non-gang members are also frequently at risk of being recruited by the gang. Thus the City Council had every reason to wish to discourage this type of association. Moreover, the difficulties attendant to sorting through a crowd and attempting to explain who must

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[18] We are advised by the Chicago Police Department that during the first eight months of 1998, gang-related homicides rose 1.6%, while the overall homicide rate fell 4.0%; gang-related aggravated battery with a firearm rose 32.4%, while the total for aggravated battery with a firearm rose only 4.4%; and drive-by shootings rose 40.4%.

[19] Although some of respondents' amici claim that the ordinance was opposed by many African-Americans (CANS Br. 4-5), even they do not dispute that its support in the minority community increased after the ordinance's results became clear. As amici Chicago Neighborhood Organizations explain, while the ordinance had substantial African-American support at its enactment, that support has increased over time, as reflected in the City Council's resolution urging this Court to sustain the ordinance enacted earlier this year, and in the petition drive in support of the ordinance that has enjoyed particular success in the minority community. See CNO Br. 14-18.

leave and who may stay if orders to disperse were directed only to gang members would be considerable. In any event, at most this is a claim that the ordinance is over-inclusive, but "narrow tailoring is required only when fundamental rights are involved." *Reno v. Flores*, 507 U.S. at 305.

Second, respondents complain that the ordinance does not require an individualized assessment of the potential dangerousness of each group of loiterers. See Resp. Br. 49-50. Of course, such assessments would be rife with subjectivity and hence give rise to the risk of arbitrary and discriminatory enforcement condemned in *Kolender*. Moreover, under the rational basis test, the government may use classifications in its legislation; given the difficulties of making individualized determinations, a failure to require them does not render a law irrational. *E.g.*, *Reno v. Flores*, 507 U.S. at 303-05. The cost attendant to any prophylactic law, including this one, is that it will sometimes reach situations in which the conduct at issue is harmless or even productive; but even respondents do not deny that substantive due process permits the legislature to strike the balance between the costs and benefits of prophylactic rules, at least when no fundamental constitutional right is at stake. See Pet. Br. 43-44. Here, the legislative decision to strike the balance as it did was eminently reasonable, especially since the consequence of permitting the police to order people whose conduct may in fact be innocuous to move along is no more than a minor inconvenience to those persons, while the consequence for a community when gang loitering invites violence, facilitates criminal activity, and instills fear and hopelessness in law-abiding people, is far more serious.

Finally, respondents renew their contention that Chicago should rely on other laws to address the effects of gang loitering. See Resp. Br. 50-52. But as we explain above, respondents ignore the City Council's findings about the utility of those other laws. Respondents and their amici no doubt sincerely believe that the problems associated

with gang crime can be adequately addressed by other measures, but the elected representatives of the people of Chicago have concluded otherwise, and in a constitutional framework that entrusts policy judgments to the people's elected representatives, the City Council's view is the one that should control.[20]

B. The Gang Loitering Ordinance Does Not Create A Status Offense.

Respondents contend that the gang loitering ordinance creates a status offense because it "lacks an *actus reus*." Resp. Br. 68. There are, however, significant deficiencies in respondents' analysis of the two types of conduct that the ordinance requires.

Respondents argue that loitering cannot qualify as an act independent of the actor's status because it involves "reflexive, everyday conduct" that is "unavoidable." Resp. Br. 69. But while standing still at some point in one's day may be unavoidable, respondents do not explain why anyone is compelled to loiter in public with criminal street gang members. Choosing to join or loiter with a gang is hardly "reflexive" conduct. And in any event, the ordinance also requires disobedience to a police order as an element of the offense it creates. That is plainly a voluntary act and not a status or condition.[21] Respond-

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[20] Respondents attempt to use the testimony of former Deputy Superintendent of Police Gerald Cooper to support their view that this ordinance is unnecessary (Resp. Br. 51-52). All Deputy Cooper said, however, was that many other laws exist that address gang crime; he did not come close to endorsing respondents' view that this law is unnecessary. In fact, he supported the law's enactment. See Supp. R. II at 175-78, 185-86. And in any event, surely the totality of the testimony before the City Council about whether existing laws addressed the problems attendant to criminal street gangs satisfactorily, as well as the findings of the City Council on that point, should control over one snippet from Deputy Cooper's testimony.

[21] On this point, respondents merely repeat their citation to *Wright v. Georgia*. See Resp. Br. 70. But that case, as we explain above, held only that a police order given to enforce racial segregation in a public park was unconstitutional by virtue of the Equal Protection Clause.

ents wholly fail to explain why an ordinance requiring disobedience to a police order amounts to "[c]riminalization of status alone." *Id.* at 68.

Indeed respondents make essentially the same argument that the Court rejected in *Powell v. Texas*, 392 U.S. 514 (1968). Powell had argued that alcoholics could not avoid public intoxication, making it a forbidden status offense, but the Court observed that while alcoholics may be compelled to drink, they need not do so in public. See *id.* at 532 (plurality opinion); *id.* at 551-54 (White, J., concurring in the result). Here as well, loitering in public in disobedience of a police order, especially in the face of legislative findings about the evils that accompany gang loitering, can properly be proscribed.

III. THE GANG LOITERING ORDINANCE DOES NOT OFFEND THE FOURTH AMENDMENT.

We explain in our opening brief that orders to move on given under the gang loitering ordinance do not violate the Fourth Amendment, both because they do not involve "seizures" within the meaning of that amendment, and because, given their minimal intrusiveness and the law enforcement interests underlying them, they are constitutionally reasonable. See Pet. Br. 47-48. Respondents, for their part, have abandoned any claim that an order to move along infringes the Fourth Amendment. Instead, they claim that arrests under the ordinance violate the Fourth Amendment because "the ordinance makes it a crime to look suspicious." Resp. Br. 72.

Respondents' position cannot be squared with the plain language of the ordinance. The ordinance does not make it a crime "to look suspicious"; it criminalizes disobedience to a police order to disperse. When police make arrests under the ordinance, then, they act not on "suspicion," but on probable cause to believe that a police